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Lebow v. Commercial Tire, Inc. Respondent's Brief Dckt. 41234

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IN THE SUPREME COURT OF THE STATE OF IDAHO

CHANCE M. LEBOW,
Claimant/Appellant,

vs.

RIGHT NOW, INC.,

and

COMMERCIAL TIRE, INC.,
Employers/Respondents,

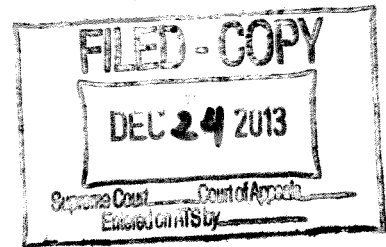
and

STATE OF IDAHO,
DEPARTMENT OF LABOR,

Respondent.

SUPREME COURT NO. 41234

BRIEF OF RESPONDENT
DEPARTMENT OF LABOR



ON APPEAL FROM THE INDUSTRIAL COMMISSION
STATE OF IDAHO
THOMAS P. BASKIN, CHAIRMAN

IDAHO DEPARTMENT OF LABOR

BY: LAWRENCE G. WASDEN
ATTORNEY GENERAL
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Idaho Department of Labor
317 W. Main Street
Boise, ID 83735
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CLAIMANT CHANCE M. LEBOW

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Caldwell, ID 83605

EMPLOYER RIGHT NOW, INC.

BY: Right Now, Inc.
212 Evans St.
Caldwell, ID 83605

EMPLOYER COMMERCIAL TIRE,
INC.

BY: Commercial Tire, Inc.
P. O. Box 970
Meridian, ID 83680-0970

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Claimant/Appellant,)	SUPREME COURT NO. 41234
)	
vs.)	BRIEF OF RESPONDENT
)	DEPARTMENT OF LABOR
RIGHT NOW, INC.,)	
)	
and)	
)	
COMMERCIAL TIRE, INC.,)	
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Employers/Respondents,)	
)	
and)	
)	
STATE OF IDAHO,)	
DEPARTMENT OF LABOR,)	
)	
Respondent.)	

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STATEMENT OF THE CASE

(1) Nature of the Case:

Chance M. LeBow (Claimant) worked for Right Now, Inc., (Employer) for just one day. Even though he enjoyed the work and agreed to work his next on-call assignment, Claimant did not to show up for his next assignment. Tr. p. 24, Ll. 22-24; p. 25, Ll. 5-9. After working just one day for Employer, Claimant filed a continued claim report with the Idaho Department of Labor (Department) in order to continue receiving unemployment benefits.¹ Exhibit 11; Tr. p. 26, L. 25; p. 27, Ll. 1-4. Less than a week after working that one day, Claimant answered “No” when asked by the Department in his continued claim report, “Did you work during the week claimed?” Exhibits 11 and 13, p. 3; Tr. p. 26, Ll. 21-25, p. 27, Ll. 1-7.

The Industrial Commission (Commission) concluded Claimant voluntarily quit without good cause and willfully failed to report his work and earnings. R. pp. 19-32. The Commission also concluded Claimant was statutorily ineligible for a waiver of the requirement to repay benefits and was liable for a 25% civil penalty. R. pp. 19-32. Claimant appeals the Commission’s Decision and Order to this Court.

(2) Course of the Proceedings Below:

On January 31, 2013, the Department received a “New Hire Verification” report from Employer indicating Employer had hired Claimant. According to the report, Claimant worked for Employer on December 3, 2012, and received wages. Exhibit 9, p. 1. Department workforce

¹ IDAPA 09.01.30.550 requires each claimant to report weekly for benefits as directed. An application for benefits or waiting week credit for a specific compensable week is called a continued claim. IDAPA 09.01.30.010.12.

consultant senior Leyla Barthlome found the discrepancy between the work and earnings Employer reported and the work and earnings Claimant reported for the week ending December 8, 2012.² Exhibits 12 and 13; Tr. p. 5, Ll. 23-25; p. 6, Ll. 1-6. In February 2013, Barthlome contacted Claimant and asked him to explain the discrepancy. Exhibits 12 and 13.

As a result of her investigation, Barthlome issued an eligibility determination on February 25, 2013, finding Claimant was not eligible for benefits because he failed to accept available suitable work. Exhibit 14. She also issued a second eligibility determination finding Claimant willfully made false statements or failed to report material facts on his claim in order to receive unemployment benefits. Exhibit 15. The next day, the Department determined Claimant had been overpaid \$1,372.00, which included \$343.00 he received for the week ending December 8, 2012; \$343.00 he received for the week ending December 15, 2012; \$343.00 he received for the week ending December 22, 2012; and \$343.00 he received for the week ending December 29, 2012. Exhibits 17 and 20. Claimant filed a request for an appeals hearing with the Department. Exhibit 19.

On March 12, 2013, the Department mailed a Notice of Telephone Hearing to the parties setting a hearing for March 27, 2013. Exhibit 1. The Notice told the parties a Department appeals examiner would consider the following issues: whether Claimant's unemployment was due to his failure without good cause to apply for available suitable work or to accept suitable work when offered in violation of Idaho Code §§ 72-1366(6) and (7); whether Claimant willfully made a false statement or willfully failed to report a material fact in order to obtain

² For unemployment benefit purposes a benefit week begins with Sunday and ends on Saturday. Benefit weeks are

unemployment insurance benefits in violation of Idaho Code § 72-1366(12); whether Claimant was subject to a civil penalty as a result of making a false statement or failing to report a material fact in violation of to Idaho Code § 72-1369(2); and if Claimant received benefits he was not entitled to receive, whether the requirement to repay those benefits would be waived pursuant to Idaho Code § 72-1369(5). Exhibit 1. The Department's Appeals Bureau included Exhibits 1 through 21 with the notice.

On March 27, 2013, a Department appeals examiner conducted a hearing. Claimant, Barthlome and Employer's representatives Brian Redford and Stephanie Glasson participated in the hearing. The appeals examiner issued a decision on March 27, 2013. R. pp. 1-5. In his decision, the appeals examiner affirmed the determination finding Claimant willfully failed to report a material fact in order to obtain unemployment benefits. R. pp. 1-5. He also imposed a 25% penalty and denied Claimant a waiver of the requirement to repay benefits to the Department. R. pp. 1-5. However, rather than address the issue of whether Claimant failed to accept suitable work listed in the notice the parties received, the appeals examiner concluded Claimant voluntarily quit without good cause in violation of Idaho Code § 72-1366(5). R. pp. 1-5. The appeals examiner modified this issue unilaterally. There is no evidence in the record the parties received any notice of this issue prior to the hearing or waived the notice requirement at the hearing.

On April 8, 2013, Claimant filed a timely appeal of the decision to the Commission. R. pp. 6-11. The Commission issued its Decision and Order on June 10, 2013, based on a *de novo*

referred to by their week ending date.

review of the record that included the exhibits admitted by the appeals examiner at the hearing and an audio recording of the hearing. Idaho Code § 72-1368(7); R. pp. 19-32. The Commission concluded Claimant received due process, denied Claimant a new hearing to consider the additional evidence he offered with his appeal, and affirmed the appeals examiner's decision. R. pp. 19-32. On July 19, 2010, Claimant filed a Notice of Appeal with this Court. R. pp. 33-35.

(3) Statement of Facts:

Claimant filed his first claim for unemployment benefits on September 27, 2010. Exhibit 7, p. 1. On November 20, 2012, Claimant filed his second claim for unemployment benefits after Commercial Tire, Inc., laid him off on November 19, 2011. Exhibit 7, pp. 1-2. At that time, his maximum weekly benefit amount was \$343.00. Exhibit 11.

Six days after filing his second claim for benefits, Claimant applied for a job with Employer. Tr. p. 16, Ll. 16-18. Employer's install manager, Allen MacKenzie, interviewed Claimant and offered him a position in Employer's apprenticeship program. Tr. p. 16, Ll. 16-19. Claimant accepted the position. Tr. p. 29, Ll. 18-23. Claimant would start with minimal to no experience and work through a four year process to become a journeyman Heating Ventilation Air Conditioning (HVAC) installer. Tr. p. 29, Ll. 18-25; p. 30, Ll. 1-5. Claimant acknowledged he was pretty sure MacKenzie explained that the work would be on-call. Tr. p. 30, Ll. 20-25.

Claimant started work on December 3, 2012, for \$8.00 an hour. Exhibit 9; Tr. p. 11, Ll. 8-11; p. 16, Ll. 19-21; p. 18, Ll. 14-16; p. 20, L. 16. Claimant worked for 11 hours that day and

earned \$88.00. Exhibit 9, p. 1; Tr. p. 11, Ll. 19-21. Employer did not call with an assignment for Claimant the following day. Tr. p. 20, Ll. 16-25.

While waiting for Employer to call him with another assignment, Claimant called the Department to discuss his unemployment insurance options. Tr. p. 22, Ll. 12-13. Although Claimant acknowledged he enjoyed working for Employer that one day, Claimant told the Department staff member who answered the phone that he did not think the job he had would work out because he did not have any training in HVAC, it was a long shot job, it would take him months to learn this stuff and it was really intense. Tr. p. 22, Ll. 12-22. He asked the staff member, “what are my options, can I quit this job and look for another job?” Tr. p. 22, Ll. 24-25. The staff member told Claimant he could not quit his job until he found another job. Tr. p. 22, L 25; p. 23, Ll. 1-3.

Claimant began looking for another job. Tr. p. 23, Ll. 3-4. Claimant contacted a former employer, Pizza Hut. Tr. p. 23, Ll. 7-10; p. 24, Ll. 6-7. Pizza Hut offered him a job as a driver, but the work would not begin until December 19, 2012. Tr. p. 23, Ll. 7-15, 25; p. 24, Ll. 1-7; p. 25, Ll. 11-13. Pizza Hut would only guarantee Claimant 10-25 hours a week. Exhibit 19, p. 1.

Claimant went to Employer’s office and spoke with MacKenzie on December 5, 2012, and MacKenzie told him there might be an assignment for him the next day. Tr. p. 21, Ll. 11-21. The next morning, MacKenzie called and asked Claimant to take the assignment. Tr. p. 22, Ll. 1-7. Claimant accepted the assignment, but then did not report for work. Exhibit 12, p. 3; Tr. p. 23, Ll. 14-17. Claimant felt the assignment was not worth his time and he had begun the hiring

process for another job. Exhibit 12; Tr. p. 23, Ll. 14-17. Claimant did not discuss any of his concerns about the assignment with Employer. Tr. p. 16, L. 25; p. 17, Ll. 1-4.

When Claimant filed his second claim for unemployment benefits on November 20, 2012, he viewed a slide presentation. Exhibit 13, p. 3; Tr. p. 7, Ll. 19-21. In the slide presentation the Department told Claimant he must file a continued claim report at the end of each week to receive benefits and if he did not file one he would not receive a payment or waiting week credit. Exhibit 4, p. 9. Another slide informed Claimant that each week he would be asked about his ability to work, his availability for work, his work seeking activities and whether he worked during the week. Exhibit 4, p. 7.

Other slides informed Claimant that he would be receiving a Claimant Benefit Rights and Responsibilities pamphlet, he would be held responsible for knowing the information in the pamphlet and if he had questions after reviewing the pamphlet to contact the Department. Exhibit 4, pp. 1 and 17. The pamphlet warned Claimant that he must report his earnings in the week he worked and not the week he was paid and to report all earnings from all employers before deductions. Exhibit 2B, p. 4. The pamphlet also gave Claimant a list of things that could stop or deny him benefits. Exhibit 2B, p. 17. Among the items listed were “quitting a job” and “missing or refusing suitable work.” Exhibit 2B, p. 17.

Another slide told Claimant that if he worked during a week for which he was claiming benefits he must report that he worked whether or not he earned wages. Exhibit 4, p. 12. The same slide also told Claimant he must report his gross wages before deductions. Exhibit 4, p. 12; Tr. p. 7, Ll. 23-25. A slide warned Claimant that if he failed to disclose information in order to

get benefits he risked felony prosecution in addition to repayment of the overpayment, payment of interest and penalties, and a 52 week disqualification. Exhibit 4, p. 14. Finally, a slide gave him the following examples of what the Department considered fraud. Specifically this slide warned:

Not reporting that you worked during a week even if you are not going to receive pay for the work performed. You work and tell us you didn't work . . . that's fraud!

You refuse work. Offered a job but refuse it and don't tell us that's fraud!

Exhibit 4, p. 15; Tr. p. 8, Ll. 2-9 (Emphasis original).

On December 9, 2012, Claimant filed a continued claim report for the week ending December 8, 2012. Exhibits 11 and 13, p. 3, Tr. p. 26, Ll. 21-25; p. 27 L. 1. In that claim report, Claimant answered "No" to the question, "Did you refuse or miss available work?" Exhibit 5, pp. 4 and 6 and Exhibit 11. He also answered "No" to the question "Did you work for any employers during the week claimed, include National Guard or Reserve?" Exhibit 5, pp. 4 and 6; Tr. p. 27, Ll. 1-4. Claimant acknowledged that he knew he had to report when he worked. Exhibit 13, p. 3. When Claimant did not report he worked, he avoided the requirement to provide his earnings and he avoided answering several follow-up questions. Exhibits 5, pp. 4-6 and 11; Tr. p. 26, L. 25; p. 27, Ll. 1-7. One of the follow-up questions Claimant avoided was, "Did you quit any job during the week?" Exhibit 5, p. 4.

ISSUES ON APPEAL

I.

Did Claimant receive a fair hearing?

II.

Is there substantial and competent evidence in the record to support the Industrial Commission's findings and conclusion that Claimant willfully made false statements or willfully failed to report materials fact in order to obtain unemployment benefits?

III.

Is there substantial and competent evidence in the record to support the Industrial Commission's findings and conclusion Claimant was ineligible for unemployment benefits because he voluntarily quit without good cause?

IV.

Is Claimant, as a matter of law, not eligible for a waiver and subject to a 25% civil penalty as a result of his false statement or failure to report a material fact?

STANDARD OF REVIEW

In appeals from decisions of the Industrial Commission, the Court's review is limited to questions of law. Idaho Const. Art. V, § 9; *Pimley v. Best Values, Inc.*, 132 Idaho 432, 434, 974 P.2d 78, 80 (1999). This Court does not reweigh the evidence or consider whether it would have reached a different conclusion from the evidence presented. *Current v. Haddons Fencing, Inc.*,

152 Idaho 10, 13, 266 P.3d 485, 488 (2011). While conflicting evidence may exist in the record, the Court will not disturb the Commission's factual findings unless they are clearly erroneous. *Ginther v. Boise Cascade Corporation*, 150 Idaho 143, 244 P.3d 1229, 1233 (2010). The factual findings of the Commission will be upheld provided they are supported by substantial and competent evidence. *Uhl v. Ballard Medical Products, Inc.*, 138 Idaho 653, 657, 67 P.3d 1265, 1269 (2003). "Substantial and competent evidence is relevant evidence that a reasonable mind might accept to support a conclusion." *Id.* "Substantial evidence is more than a scintilla of proof, but less than a preponderance." *Painter v. Potlach Corporation*, 138 Idaho 309, 312, 63 P.2d 435, 438 (2003), *citing Zapata v. J.R. Simplot Co.*, 132 Idaho 513, 515, 975 P.2d 1178, 1180 (1999).

It is for the Commission to determine the credit and weight to be given to the testimony admitted. *Bullard v. Sun Valley Aviation, Inc.*, 128 Idaho 430, 432, 914 P.2d 564, 566 (1996). In reviewing a decision of the Commission, the Court views all facts and inferences in the light most favorable to the party who prevailed before the Commission. *Current*, 152 Idaho at 13, 266 P.3d at 488.

ARGUMENT

I.

Claimant received a fair hearing.

In his appeal to the Industrial Commission and in his Appeal to this Court Claimant contends he did not receive a fair hearing. R. pp. 7 and 33. Federal law requires the "[o]ppportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied" 42 U.S.C. § 503(a)(3). This Court has held the fair

hearing requirement is satisfied at the Department appellate level when “a fair and impartial hearing” is held. *Fouste v. Department of Employment*, 97 Idaho 162, 167, 540 P.2d 1341, 1346 (1975).

Claimant did not offer any reason other than incorrect facts to support his claim that he failed to receive a fair hearing. The Commission concluded Claimant received a fair hearing because he participated in the hearing and had the opportunity to testify, cross examine witnesses and provide a closing statement. R. p. 21. The Commission went on to consider whether it should hold a new hearing because Claimant submitted additional evidence with his appeal. R. p. 21.

Normally, the Commission considers the same record considered by the appeals examiner unless it appears to the Commission that the interests of justice require the consideration of additional evidence. *Flowers v. Shenango Screenprinting, Inc.*, 150 Idaho 295, 298, 246 P.3d 668, 671 (2010). The Commission may grant a new hearing or remand the matter to the appeals examiner. Idaho Code § 72-1368(7). The Commission’s decision to permit or exclude evidence not considered by the appeals examiner is discretionary. *Id.*

This Court employs the following three-part test to determine whether the Commission has abused its discretion: (1) whether the Commission correctly perceived the issue as one of discretion, (2) whether the Commission acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available, and (3) whether the Commission reached its decision by an exercise of reason. *Super Grade, Inc. v. Idaho*

Department of Labor, 144 Idaho 386, 390, 162 P.3d 765, 769 (2007); *Flowers*, 150 Idaho at 299, 246 P.3d at 672.

Here, the Commission specifically acknowledged that it perceived the issue as one of discretion. R. p. 20. The Commission has the discretion to admit additional evidence, but it is not required to do so. *Flowers*, 150 Idaho at 298, 246 P.3d at 671. The Commission's rules require a party requesting a hearing to provide an explanation of why the proposed additional evidence was not presented earlier. R.A.P.P. 7(B). Claimant failed to provide an explanation of why the evidence was not presented earlier.

The Commission noted that Claimant participated in the hearing and had ample opportunity to present evidence during and after the hearing. The Commission noted he received instructions that accompanied the Notice of Telephone Hearing. R. p. 21. Those instructions informed Claimant that he was responsible for insuring all the documents critical to his position were included in the record. Exhibit 2. The instructions also told him how to add them to the record. Exhibit 2. Those instructions told Claimant he could ask the appeals examiner to reopen the hearing if he had additional evidence that was not available at the time of the hearing. Exhibit 2.

Under the circumstances, the Commission correctly perceived the issue as one of discretion. The Commission acted within the boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it, and reached its decision by an exercise of reason. The Commission's decision to deny Claimant a hearing met the requirements of the test. *Flowers*, 150 Idaho 299, 246 P.3d at 672.

However, in limiting its focus to the additional evidence Claimant offered, the Commission overlooked a due process issue created by the appeals Examiner when he modified one of the issues he considered in his decision. Claimant received two eligibility determinations. There is no due process issue with regard to the appeals examiner's review of the determination finding Claimant willfully made a false statement or failed to report a material fact. Exhibit 15. Claimant had notice that the appeals examiner would consider this issue. Exhibit 1.

However, as a result of the evidence presented at the hearing, the appeals examiner substituted the issue of whether Claimant voluntarily quit with good cause, for the issue of whether Claimant failed to accept available suitable work. R. pp. 1-5 There is no evidence in the record that the parties had notice the appeals examiner would consider whether Claimant had good cause to leave his employment under Idaho Code § 72-1366(5). This Court has held an administrative tribunal may not raise issues without first serving the affected party with fair notice and provide him with a full opportunity to meet the issue. *White v. Idaho Forest Industries*, 98 Idaho 784, 785, 572 P.2d 887, 889 (1977).

In *White*, an appeals examiner ruled White was eligible for benefits because he was not discharged for misconduct. *White*, 98 Idaho at 785, 572 P.2d at 888. His employer appealed and asked the Commission for a hearing. *Id.* White did not attend the hearing and the Commission received evidence from White's employer leading it to conclude White was not eligible for benefits because he failed to accept work when offered. *Id.* This Court agreed with White that the notice of hearing he received from the Commission did not put him on notice the Commission would hear additional evidence on a new issue. *White*, 98 Idaho at 786, 572 P.2d at

889. The notice White received told him that he need not attend the hearing if he was satisfied and wanted to rest on the record created below. *White*, 98 Idaho at 785, 572 P.2d at 888.

Here however, the appeals examiner and not the Commission considered a new issue. This Court has considered a case similar to this case. In *Rogers v. Trim House*, 99 Idaho 746, 588 P.2d 945 (1979), the appeals examiner considered a new issue without giving Rogers notice. *Rogers*, 99 Idaho at 748, 588 P.2d at 947.

Rogers, like Claimant here, participated in the hearing before the appeals examiner. *Id.* The notice Rogers received before the hearing indicated the appeals examiner would determine whether he was eligible for benefits based on January 10, 1977, separation from employment. Rogers participated in the hearing and the evidence presented at the hearing indicated that Rogers not only quit in January, but had also quit and returned to work one month earlier. *Id.*

In his decision the appeals examiner considered whether Rogers was eligible for benefits based on both separations. *Id.* Rogers had no notice the appeals examiner would consider any issues related to his earlier separation. *Id.* This Court concluded it was error for an appeals examiner to modify the determination to make findings on an issue not properly before the appeals examiner. *Rogers*, 99 Idaho at 748, 588 P.2d at 947. However, the Court also concluded that the question remained as to whether the lack of notice with respect to the earlier separation was prejudicial error and noted that Rogers had the burden of showing prejudicial error. *Rogers*, 99 Idaho at 749, 588 Idaho at 948.

Here, as in *Rogers*, Claimant has not made any showing that he was prejudiced by the failure of the appeals examiner to give him notice he would determine whether he quit with good

cause. *Rogers*, 99 Idaho at 749, 588 P.2d at 948. Claimant had the opportunity to present and rebut evidence. Claimant testified that MacKenzie called him on December 6th. Claimant testified, “Allen is like I got a job for you, you want to come in and work and I said sure . . .” Tr. p. 22, Ll. 1-9; p. 23, Ll. 14-17. Claimant accepted the assignment, but failed to show up.

He called a Department staff member while waiting for Employer to call him back and asked, “what are my options, can I quit this job and look for another job?” Exhibit 13, p. 4; Tr. p. 22, Ll. 24-25. Claimant argued at the hearing and argues now that he did not fail to accept suitable work rather he quit with good cause. R. p. 33; Tr. p. 22, 14-25; p. 23, Ll. 14-23; p. 24, Ll. 20-25; p. 26, Ll. 1-4; p. 31, Ll. 17-24. When Claimant found another job, he abandoned his job with Employer. Exhibit 12; Tr. p. 23, Ll. 14-17. At the hearing Employer maintained Claimant abandoned the job. Exhibits 9 and 12, p. 2; Tr. p. 13, Ll. 2-4; p. 17, Ll. 1-13. It is clear throughout the hearing that Claimant thought he quit.

Due process is not a rigidly applied concept, but rather, is a flexible concept calling for such procedural protections as are warranted by the particular situation. *Neighbors for a Healthy Gold Fork v. Valley County*, 145 Idaho 121, 127, 176 P.3d 126, 132 (2007). At a minimum, hearing procedures must provide an opportunity to present and rebut evidence. *Id.*

Claimant has not demonstrated he suffered any prejudice from the appeals examiner’s failure to provide notice on this issue. Claimant had the opportunity to present and rebut evidence presented by the Department and Employer. Claimant argued in his notice of appeal to the Commission that he was not offered work on December 5, 2012, because he had already begun working on December 3, 2012. R. p. 7. He argued to the Commission that he quit his job.

R. p. 7. The Commission agreed finding that “[w]hile Claimant seems to question the date and manner that Employer offered him the additional assignment, what is not in dispute is that Claimant accepted the assignment, but failed to show up for work.” R. p. 23. Substantial and competent evidence indicates that the appeals examiner erred, but that error was harmless. Claimant’s due process rights were not violated and he received a fair hearing.

II.

There is substantial and competent evidence in the record to support the Industrial Commission’s findings and conclusion that Claimant willfully made a false statement or willfully failed to report a material fact in order to obtain unemployment benefits.

When filing a claim for benefits, a claimant is required to provide the Department with all necessary information pertinent to his eligibility. Idaho Code § 72-1366(1). In *Meyer v. Skyline Mobile Homes*, 99 Idaho 754, 589 P.2d 89 (1979), this Court held that the Department should be able to assume claimants “are reporting all the information solicited from them fully and accurately.” *Meyer*, 99 Idaho at 760, 589 P.2d at 95.

To promote accurate reporting, Idaho Code § 72-1366(12) makes a claimant ineligible for benefits and subject to penalties when he makes a willful false statement of a material fact or willfully fails to report a material fact to the Department in order to obtain benefits. Idaho Code §§ 72-1366(12) and 72-1369(2). Pursuant to § 72-1366(12), a claimant is not entitled to unemployment benefits for a period of fifty-two (52) weeks, he is ineligible for waiting week credit and he must repay any sums received for any week for which he received waiting week

credit or benefits as a result of having willfully made a false statement or having willfully failed to report a material fact. Idaho Code § 72-1366(12).

An allegation that a claimant is ineligible for benefits under Idaho Code § 72-1366(12) does not rise to the level of an allegation of fraud, but rather is a “lesser willful standard.” *Cox v. Hollow Leg Pub*, 144 Idaho 154, 159, 158 P.3d 930, 935 (2007). The burden of establishing statutory eligibility in these cases rests with Claimant. *McNulty v. Sinclair Oil*, 152 Idaho 582, 585, 272 P.3d 554, 557 (2012). Claimant must demonstrate that his failure to accurately report his work and earnings does not render him ineligible under Idaho Code § 72-1366(12). The Commission concluded Claimant did not meet his burden. R. pp. 19-31. It concluded Claimant made a willful false statement of a material fact in order to obtain benefits when he failed to report his work and earnings for the week ending December 8, 2012. R. p. 29.

On December 9, 2012, Claimant filed a weekly continued claim report for the week ending December 8, 2012 in order to receive a \$343.00 benefit payment. Exhibit 11, Tr. p. 26, Ll. 21-25; p. 27, L. 1. In that claim report, Claimant answered “No” to the question, “Did you work for any employers during the week claimed?” Exhibit 5, pp. 4 and 6; Tr. p. 27, Ll. 1-7. Claimant acknowledged that he knew he had to report when he worked. Exhibit 13, p. 3. Claimant also acknowledged that he worked and earned \$88.00 on December 3, 2012, but on December 9, 2012, when he filed his continued claim report, Claimant did not report he worked. Exhibits 11 and 13, p. 4; Tr. p. 27, Ll. 1-19. Claimant decided not to return to work for Employer. By answering “No” to this question, he avoided follow-up questions about his earnings and he avoided the follow-up question “Did you quit any job during the week?” Exhibit

5, pp. 4-6. A truthful answer to this question would have disqualified him for benefits until he earned 14 times his weekly benefit amount. Idaho Code § 72-1366(14).

The Commission found Claimant's failure to report his work and earnings was material. R. p. 26. "[A] fact is material if it is relevant to a determination of a claimant's right to benefits. To be material, the fact need not actually affect the outcome of the eligibility determination." IDAPA 09.01.04.012. In *McNulty*, this Court concluded, "What could be more material in seeking unemployment benefits than whether the claimant is employed?" *McNulty*, 152 Idaho at 585, 272 P.3d at 557.

As a final step in the inquiry, the Commission determined Claimant's failure to report was willful. R. p. 27. This Court has adopted an interpretation of the word "willful" that does not require a demonstration of evil intent on the part of a claimant to reach a conclusion that his conduct was willful. In *Meyer*, this Court defined "willfully" as it applies to this provision of the Employment Security Law as follows:

[Willfully] implies simply a purpose or willingness to commit the act or make the omission referred to. It does not require any intent to violate the law, in the sense of having an evil or corrupt motive or intent. It does imply a conscious wrong, and may be distinguished from an act maliciously or corruptly done, in that it does not necessarily imply an evil mind, but is more nearly synonymous with "intentionally," "designedly," "without lawful excuse," and therefore not accidental.

Meyer, 99 Idaho at 761, 589 P.2d at 96 (quoting, *Archbold v. Huntington*, 34 Idaho 558, 565, 201 P. 1041, 1043, (1921)).

Claimant maintained that he did not report his work and earnings because he was too busy looking for a job; he was not sure Employer would pay him; and then he was not sure he

would keep the money. Exhibit 13, pp. 3-4; Tr. p. 27, Ll. 12-19. Claimant also argued that when he called the Department on December 5, 2012 to ask about quitting his job with Employer he told the Department he was working for Employer. Tr. p. 27, Ll. 23-35. Claimant did not contact the Department after he was paid and decided to keep the money. Exhibit 13, p. 4; Tr. p. 27, Ll. 20-25; p. 28, Ll. 1-28. Claimant never reported his earnings.

Despite Claimant's explanation for his conduct, the Commission found his conduct willful. R. p. 27. Citing the pamphlet and the slideshow the Commission found Claimant received clear and repetitive instructions on the need to report work and earnings and the consequences for failing to do so. R. pp. 27-28. When a claimant knows what information the Department is soliciting, but nevertheless deliberately chooses to respond without clarification, this Court has held it ordinarily supports a finding of willful falsehood or concealment. *Cox v. Hollow Leg Pub*, 144 Idaho 154, 158, 158 P.3d 930, 934 (2007). This Court has also affirmed the Commission's determination that a claimant willfully failed to report his earnings based on evidence that a claimant was aware of the regulations regarding unemployment insurance. *Gaehring v. Department of Employment*, 100 Idaho 118, 119, 594 P.2d 628, 629 (1979). Claimant was clearly aware of the regulations. When Barthlome asked him about his understanding of the reporting requirements, he responded "to report when I work." Exhibit 3, p. 3.

Claimant's conduct meets this Court's definition of willful. A preponderance of the evidence in the record supports the Commission's conclusion that Claimant willfully failed to report material facts in order to obtain benefits in violation of Idaho Code § 72-1366(12).

III.

There is substantial and competent evidence in the record to support the Industrial Commission's findings and conclusion Claimant was ineligible for unemployment benefits because he voluntarily quit without good cause.

When employment ends voluntarily, the burden is on the Claimant to demonstrate his departure was for good cause. *Ewins v. Allied Security*, 138 Idaho 343, 347, 63 P.3d 469, 473 (2003); Idaho Code § 72-1366(5). Claimant has the burden of establishing good cause by a preponderance of the evidence for failing to show up for work. *Teevan v. Office of Attorney General*, 130 Idaho 79, 82, 936 P.2d 1321, 1324 (1997). "A preponderance of the evidence means that when weighing all of the evidence in the record, the evidence on which the finder of fact relies is more probably true than not." *Oxley v. Medicine Rock Specialties, Inc.*, 139 Idaho 476, 80 P.3d 1077, 1082 (2003). The question of whether Claimant had good cause to quit is a factual one determined by the Commission on a case by case basis. *Ewins*, 138 Idaho at 347, 63 P.3d at 473.

To constitute good cause, the circumstances that compel the decision to leave employment must be real, not imaginary, substantial, not trifling, and reasonable, not whimsical. There must be some compulsion produced by extraneous and necessitous circumstances. *Ewins*, 138 Idaho at 347, 63 P.3d at 473. "Good cause is determined by a reasonable person standard: whether a reasonable person would consider the circumstances that prompted the claimant to leave work to be real, substantial, and compelling." *Teevan*, 130 Idaho at 82, 936 P.2d at 1324, In addition, pursuant to IDAPA 09.01.30.450.02, Claimant must also prove his reasons for leaving employment arose from his working conditions, job tasks, or employment agreement.

While the date he accepted a second assignment from Employer is in dispute, there is no dispute Claimant accepted the assignment, but opted not to go because he felt it was just not going to work out. Tr. p. 23, Ll. 20-21. At the hearing, Claimant acknowledged that he took the job with Employer knowing it would be on-call employment. Tr. p. 30, Ll. 20-25. The Commission noted that he continued working for Employer until he found another job. R. p. 24. He testified that he decided not to return to work because he had “a pretty good feeling” he would be hired by Pizza Hut. Tr. p. 25, Ll. 9-12. The Commission concluded that leaving his work to take a job at Pizza Hut was purely personal. R. p. 24.

IDAPA 09.01.30.450.06 provides “a claimant who quits a temporary job for a permanent job or who quits part-time employment for employment with an increase in the number of hours of work shall be deemed to have quit work with good cause connected with employment.” Claimant did not meet this rule’s exception. Claimant left one part-time permanent job for another part-time permanent job. Exhibit 19, p. 1; Tr. p. 29, Ll. 18-25; p. 30, Ll. 1-5. The Commission noted the job Claimant had with Employer was not full time, but as the Commission found there is no evidence it was not permanent. R. 24. Claimant acknowledged that his job with Pizza Hut “only guaranteed 10-25 hours a week.” Again there was no evidence it was not permanent. Exhibit 19, p. 1. Nor is there any evidence in the record to suggest the hours the Pizza Hut job offered would constitute an increase when compared to the number of hours offered by Employer.

In order to demonstrate good cause an employee must explore all viable options before making the decision to quit. *Ewins*, 138 Idaho at 348, 63, P.3d at 474. Claimant testified that in

addition to not wanting to work on-call work, he felt he could not handle the job and it was “messaging” with his anxiety. Tr. p. 31, Ll. 15-17. Claimant never raised any of these concerns with Employer. Mr. Redford, Employer’s general manager, testified that there was no indication Claimant had any issue or problem with the work he was doing for Employer. Tr. p. 16, L. 25; p. 17, Ll. 1-4.

As the Commission noted, the primary policy behind of the Employment Security Act is to prevent involuntary unemployment and not to encourage the upgrading of employment. *Ewins*, 138 Idaho at 348, 63 P.3d at 474; see also, *Garner v. Horkley Oil*, 123 Idaho 831, 834, 853 P.2d 576, 579 (1993). Given that policy, the Commission’s conclusion that Claimant quit without good cause is supported by substantial and competent evidence.

IV.

As a matter of law Claimant is not eligible for a waiver and subject to a 25% civil penalty as a result of his false statement or failure to report a material fact.

Under Idaho’s Employment Security Law, an overpayment occurs when a claimant receives benefits to which he is not entitled. Idaho Code §72-1369(1). Overpayments must be repaid to the Department. Idaho Code §72-1369(1). Claimant received benefits the Department determined were overpaid week ending December 8, 2012, the week ending December 15, 2012, the week ending December 22, 2012, and the week ending December 29, 2012. Exhibit 20. The Department issued a Determination of Overpayment informing Claimant he had to repay the \$1,372.00 in benefits he received. Exhibit 17. Claimant appealed that Determination. Exhibit 19.

The Appeals Examiner concluded Claimant was ineligible for benefits because he quit without good cause and made a willful false statement in order to receive benefits. R. pp. 1-5. The Commission affirmed the appeals examiner's decision on those issues. R. pp. 19-31. Substantial and competent evidence supports those conclusions. Both the appeals examiner and the Commission addressed the waiver issue with regard to the week ending December 8, 2012, but both overlooked the portion of the overpayment created by the payments Claimant received for the week ending December 15, 2012, through the week ending December 29, 2012. Because substantial and competent evidence supports the Commission's conclusion that Claimant willfully made false statements or failed to report material facts, Claimant was also ineligible for benefits for the week ending December 15, 2012, through the week ending December 29, 2012, as well as the week ending December 8, 2012, as a matter of law.

When a claimant quits without good cause or fails to accept suitable work when offered, he is ineligible for benefits until he works and receives wages in the amount of at least fourteen times his weekly benefit amount. Idaho Code § 72-1366(14). Had Claimant been truthful when he filed his continued claim report for the week ending December 8, 2012, he would not have been eligible for benefits he received for the week ending December 8, 2012, because he failed to report his work, earnings and that he quit his job. Idaho Code § 72-1366(5). In addition, Claimant would not have been eligible for benefits after the week ending December 8, 2012, until he earned 14 times his weekly benefit amount or \$4,802.00. The only reason Claimant continued receiving benefits for the weeks following December 8, 2012, is solely because Claimant failed to report that he worked and quit on the continued claim report he filed with the

Department on December 9, 2012. He received benefits those weeks as a result of his willful false statements in violation of §72-1366(12).

While the Decision to grant a waiver is discretionary, that discretion is limited. Idaho Code §72-1369(5). To be eligible for a waiver, the overpayment sought to be waived must be one “other than one resulting from a false statement, misrepresentation, or failure to report a material fact.” Idaho Code § 72-1369(5). Because substantial and competent evidence supports the finding that Claimant made false statements neither the Department, the appeals examiner, nor the Commission have the discretion to waive any part of the overpayment created as a result of those false statements or relieve penalty imposed pursuant to § 72-1369(2). Idaho Code §72-1369(5). As a matter of law Claimant is not eligible for a waiver.


CONCLUSION

Substantial and competent evidence in the record support the Industrial Commission’s findings and conclusions that Claimant received a fair hearing. Substantial and competent evidence also support the Commission’s denial of a new hearing and its conclusion that Claimant was ineligible for benefits because he voluntarily quit without good cause and willfully failed to report material facts while claiming unemployment insurance benefits. The Department asks the Court to affirm the Commission’s Decision on those issues.

The Department also asks this Court find as a matter of law that because Claimant was not eligible for a waiver of the requirement to repay benefits for the week ending December 8, 2012, he was also not eligible for benefits the weeks ending December 15, 2012, through the

week ending December 29, 2012, or in the alternative to remand the matter back solely for the Commission to consider this issue.

Respectfully submitted,


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Idaho Department of Labor

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 24th day of December, 2013, I served two true and correct copies of the foregoing Brief of Respondent Department of Labor upon each of the following by depositing said copies in the United States mail, first class, postage prepaid:

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